

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

Effective Date for Entitlement to VA Benefits 10,576

FILE: B-190420

DATE: June 26, 1979

MATTER OF: Lieutenant Colonel Leo A. Fitzgerald, USAF, Retired  
*addressee # personal name*

DIGEST: A retired Regular Air Force Officer employed in a Federal civilian position whose retired pay was subject to reduction under the Dual Compensation Act, 5 U.S.C. § 5532, was advised by the VA on February 23, 1978, that he was entitled to VA disability compensation retroactive to June 26, 1977. The officer filed a waiver of retired pay with the service department, pursuant to 38 U.S.C. § 3105, on March 3, 1978. Waiver of retired pay upon notification of entitlement to VA compensation is effective from the earliest date of entitlement to VA compensation; but the additional amount due is payable as VA compensation, and not retired pay. Matter of Lieutenant Colonel Oliver B. Larson, 55 Comp. Gen. 1402 (1976), is modified.

DLG 01926

Section 5532 of Title 5, United States Code, requires that the pay of retired military members be reduced upon their acceptance of Federal civilian employment. Section 3104 of Title 38, United States Code, prohibits the concurrent payment of military retired pay and Veterans Administration (VA) pension or compensation benefits. Section 3105 of Title 38, however, authorizes members to receive both retired pay and VA pension or compensation payments so long as they waive entitlement to retired pay in an amount equivalent to the veterans' benefits paid them.

A member gains in two ways by receiving payments characterized as veterans' benefits rather than retired pay: veterans' benefits are not taxable, and should the member become federally employed, veterans' benefits are not subject to reduction by the Dual Compensation Act, 5 U.S.C. 5532 to which retired pay is subject.

The present case involves a retired Regular officer, Lieutenant Colonel Leo A. Fitzgerald, USAF, Retired, whose retired pay was reduced upon his Federal civilian employment

~~005698~~  
Dual compensation  
Retired Air Force  
Veterans pension  
Veterans disability  
Compensation

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At a later date the VA determined that he was entitled to veterans' compensation payments retroactively as well as prospectively. Upon learning of his new entitlement, he executed a waiver of the appropriate amount of retired pay entitlement. The question we are asked to resolve is whether the proper effective date to be given the waiver is the date it was executed or the date of the earliest entitlement to veterans' benefits.)

The request for an advance decision was made by Mr. Ernest E. Heuer, Deputy Chief, Accounting Division, Air Force Accounting and Finance Center. It has been assigned Submission No. DO-AF-1311, by the Department of Defense Military Pay and Allowance Committee and was forwarded to us by letter dated November 20, 1978.

Colonel Fitzgerald retired from the Air Force on October 31, 1966, and has been employed in a civilian position with the Federal Government since July 17, 1967, during which time his retired pay has been reduced under the Dual Compensation Act. On June 26, 1977, he became ill and was hospitalized through August 6, 1977. In September 1977, he returned to his civilian employment and at that time applied to the VA for disability compensation. On February 23, 1978, the VA determined that Colonel Fitzgerald was disabled beginning June 26, 1977, and was entitled to receive VA compensation from that date. However, he was advised that if he elected to receive VA compensation he should return VA Form 21-651, to indicate waiver of that portion of his military retired pay which was equal to his VA disability compensation entitlement since he could not receive both. Colonel Fitzgerald completed and forwarded this form to the VA on March 3, 1978, and his retired pay was reduced in the amount of his VA compensation payment effective May 1, 1978.

The Air Force requests our determination of the effective date of Colonel Fitzgerald's waiver of his retired pay so that it may determine the proper amount of reductions from his retired pay to be made pursuant to the dual compensation provision. The Air Force computes the additional amount Colonel Fitzgerald would be entitled to as \$2,535.30 if his waiver of retired pay in favor of VA compensation may be given effect as of June 26, 1977, the earliest date of

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entitlement to VA compensation, rather than March 3, 1978, the date the waiver was executed.

A valid waiver of retired pay and the payment of VA benefits on the basis of such waiver operates to reduce the legally authorized retired pay by the amount waived and from the effective date of the waiver the retiree ceases to be entitled to retired pay equal in amount to the compensation which he is entitled to receive from the VA. See 36 Comp. Gen. 799 (1951). Disability compensation payable by the VA is not retired pay and accordingly, payments equal in amount to the VA compensation entitlement and received subsequent to the effective date of the waiver are classified as disability compensation and are not subject to reduction under the dual compensation provisions.

Concerning the effective date of a valid waiver of retired pay, we have held that where the VA award of disability compensation, retroactively effective, is delayed administratively, the service department concerned "may not establish an effective date for waiver which would operate to deny the member the full monetary benefit which he would have otherwise received had the award of disability compensation been timely established on or before the date on which he became entitled thereto". See Matter of Lt. Colonel Oliver B. Larson, USAF, Retired, 55 Comp. Gen. 1402, (1976).

That case involved a member who had filed a waiver of his retired pay, (VA Form 21-651) with the Air Force prior to the beginning date of the retroactive period of a VA award of disability compensation. We believe that this rule should also be applied where the member files his waiver of retired pay upon being advised by the VA of his entitlement to VA compensation. Since the member's right to elect to receive VA compensation does not accrue until the VA makes the determination of compensation entitlement, it is our view that the member need not file the waiver prior to the VA determination of entitlement in order to receive the full benefit of the compensation award with regard to dual compensation reduction.

This view is consistent with the congressional intent to provide retired members the full benefit of a VA award

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for taxation purposes. In that regard Congress recently amended 38 U.S.C. § 3101 to provide that the filing of a waiver of retired or retirement pay in the amount of VA pension or compensation before the end of the 1-year period from the date of the individual's notification of eligibility for VA compensation shall exempt the retired pay from taxation in the amount of the VA pension or compensation which would have been paid but for the receipt of such pay. See Section 301 of the Veterans' Disability Compensation and Survivors' Benefits Act of 1978, Public Law 95-479, October 18, 1978, 92 Stat. 1560, 1564. The purpose of this legislation was to clarify the intent of the Congress to assure the exemption from taxation of compensation paid in lieu of military retired pay. See H.R. Rep. No. 95-1226, 95th Cong. 2d Sess. pp. 1,9 (1978).

In view of the above, where a member files a waiver of retired pay in an amount equal to his VA compensation entitlement, such waiver operates to classify as VA compensation the retired pay, equal in amount to the VA compensation, received during the period covered by the award of VA compensation. Thus, retired pay received by Colonel Fitzgerald since June 26, 1977, the beginning date of his VA compensation entitlement is now to be classified, in an amount equal to the compensation, as VA compensation, so as to be excluded from reduction under the dual compensation provisions.

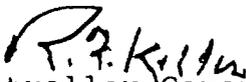
The Air Force has stated that in accordance with its interpretation of our decision in Larson it has adjusted Colonel Fitzgerald's retired pay for the period between the date he had filed the waiver, March 3, 1978, and the date it had adjusted his retired pay, May 1, 1978. In Larson, we advised the Air Force to recompute the voucher presented by the member to retroactively adjust under the dual compensation formula of 5 U.S.C. § 5532, the retired pay received by the member from the effective date of the waiver. However, further analysis shows that the additional payment actually due the member would be payable by the VA as compensation and not by the service department.

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While the effect of the VA award, retroactive to the earliest date of entitlement, is to decrease the dual compensation reduction from the member's retired pay, this adjustment in the dual compensation reduction is the result of the retired pay, equal in amount to the VA compensation award, being classified as VA compensation. Thus, while the effect of the waiver is to increase the total monetary entitlement of the member, retired pay plus VA compensation, it also operates to reduce the amount payable from the service department as retired pay. Accordingly, the additional amount due the member as the result of retroactively classifying as VA compensation the retired pay received from the earliest date of the VA entitlement would be payable by the VA and not the service department. At this point we must recognize that the VA has full discretion as to whether to make such payment since we have no authority to direct the VA to pay benefits. See 38 U.S.C. § 211(a)(1976). We have no reason to believe, however, ~~that based upon a~~ full analysis of this situation, the VA will come to a contrary conclusion.

To the extent that Larson is inconsistent with this decision, it is modified in accordance with the foregoing, and this decision should be followed in the future. While this decision authorizes a retroactive effective date for the waiver of May 1977, the retroactive pay adjustment for a portion (March 3, 1978 to May 1978) of the period made under Larson need not be disturbed.

Acting

  
Comptroller General  
of the United States